No. 77-1071

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

DAVID L. LINFIELD, PETITIONER

V.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

David L. Linfield
45 Tehama Street
Brooklyn, New York
11218

January 30, 1978

Subject Index

B. Cases, Textbooks, Statutes Cited

Cases

(b) The decision that we seek reversed is the sua sponte dismissal decision of the court of appeals of the State of New York published on January 10, 1978 and entered thereon or soon thereafter. The fourteenth amendment to the constitution and the court's decision in Yick Wo vs Hopkins, 118 US 356, confer on the court jurisdiction.

(c) On September 1, 1975, the petitioner, Mr. Linfield, lost his job at Brooklyn College, a branch of CUNY (City University of New York). At that time, the petitioner was a ten year full time satisfactory (p. 36 of this petition) employee at Brooklyn College and a nearly thirteen year employee of CUNY. From September 1, 1961 to August 31, 1966 and from September 1, 1970 to August 31, 1975, the petitioner worked full time for Brooklyn College. In the latter five years, he worked full time in Brooklyn College's remedial educational program.

In a grievance-arbitration process, the petitioner maintained that he lost his job because of discrimination against white workers in Brooklyn College's remedial program. On December 18, 1976, an arbitrator rejected Mr. Linfield's charge stating, "the conclusion here has to be that the record does not support Mr.

Linfield's charge of discrimination... " (p. 35 of this petition) Mr. Linfield went into New York State Supreme Court to have the arbital award vacated, claiming that the courts of New York State cannot countenance the existence of an extra-judicial decision-grievance-arbitration system practicing racial discrimination.

The Hon. Martin B. Stecher, Justice of the Supreme Court of the State of New York, First Judicial Department, wrote in a decision dated June 30, 1977, "The petitioner, however, appears to state a cause of action pursuant to the provisions of the Equal Employment Opportunity Act (Pub.L. 88-352, Title 7, Sect. 701, et seq., 42 USC 2000 (e) et seq.) and, perhaps, under the Civil Rights Act (42 USC 1983). ... His papers adequately allege a violation of the Equal Employment Opportunity Act." (pp. 26-27 of this petition)

But, as we shall presently show, there were grave constitutional defects in the decision, judgment and order of the state supreme court. The refusal of the court of appeals to hear the petitioner and to correct these defects reduced, if not eliminated, the rights of the petitioner, a native born citizen, to oppose racial discrimination against him in the decision-grievance-arbitration process of CUNY's remedial educational program. Such a refusal is a constitutionally impermissible administration of justice.

According to CPLR 5601 (p. 13 of this petition), from state supreme court,

the petitioner may appeal as of right if "the only question involved on the appeal is a statutory provision of the state or of the United States under the constitution of the state or of the United States;" but from the appellate division, the petitioner may only appeal as of right if there "is directly involved the construction of the constitution of the state or of the United States." Cohen and Karger state that no appeal lies as of right from the unanimous determination of the appellate division (Cohen and Karger, Powers of the New York Court of Appeals, Art. 51, P. 231).

Exercising his constitutional right to appeal to the court of appeals on the meaning of a statutory provision under the constitution, the petitioner appealed directly to the court of appeals from the state supreme court.

The appeal was dismissed because "a direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved." (N.Y. State Constitution, Art. VI, Par. 3 (b)(2)) We maintain that the court of appeals erred in relying on the above New York State constitutional provision, and that error is of Federal constitutional magnitude.

(Significantly, on January 10, 1978 the court of appeals <u>sua sponte</u> dismissed motion number 1231 "upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the constitution." Such was <u>not</u>

the basis of the sua sponte dismissal against Linfield. If the answer to the question raised by Mr. Linfield to the court of appeals is negative, the judgment and order of the state supreme court determined the proceeding within the meaning of the constitution and in violation of the constitution.

Also significantly, on January 10, 1978, the court of appeals sua sponte dismissed motion number 1232 "upon the ground that no substantive constitutional question is directly involved" (CPLR 5601 (b)(1); p. 13 of this petition). Such was not the basis for the dismissal against Linfield, for very substantial constitutional questions are involved -- now, the administration of justice in New York State in such a way that violates Linfield's fourteenth amendment rights.)

An examination of the case will show that "the only question involved in the appeal is a statutory provision of the state or of the United States under the constitution of the state or of the United States" (CPLR 5601 (b)(2), p. 13 of this petition), i.e., 42 USC 2000 (e) et seq. and 42 USC 1983. The question was: does the petitioner have certain rights to proceed under the aforementioned Federal statute(s) in state court. There was no other question involved in the appeal.

If the answer to the question of the previous paragraph is "No", then the state supreme court determined the case within the meaning of the constitution and in violation of the constitution. The

administrators of justice must be particularly careful never to diminish the rights of an alleged victim of racial discrimination. Thus the court of appeals erred in its administration of the aforementioned article of the state constitution, and that administration involved violation of Linfield's fourteenth amendment rights.

Let us state the necessary details.

The court of original instance wrote in its judgment and order dated November 15, 1977, " ... respondent's cross petition to confirm the (arbitrator's) award is granted to the extent that such judgment shall not affect rights which the petitioner may have under 42 USC 2000 (e) et seq and 42 USC 1983 ... (and the petitioner has) sixty (60) days from entry of this judgment and order, to move in this court to amend the petition pursuant to the provisions of CPLR 103 (c) to plead a cause of action under 42 USC 2000 (e) et seq or under 42 USC 1983 or both, if the petitioner be so advised. Nothing herein contained shall be deemed a determination on the merits concerning the petitioner's right to proceed by independent action under either of the said Federal statutes ..." (p. 23,pet) On December 14, 1977, the petitioner wrote to the court of appeals, " ... I did not cause the entry of the judgment and order of the Hon. Martin B. Stecher dated November 15, 1977 because I was afraid that I might lose a right, assuming I have such a right, to proceed under the aforementioned Federal statute(s), while awaiting the judgment or order

of the Court of Appeals."

Most important - the petitioner further wrote to the court of appeals, "Statutes of limitations may influence the determination whether or not the petitioner has the right to proceed under either or both of the aforementioned Federal statutes. If the petitioner does not have the right to so proceed in state court, the judgment and order of the court of original instance is from all possible points of view, de facto, final. ... The petitioner moves that the Court of Appeals amend the order and judgment of the court of original instance to affirm or deny the petitioner's rights to proceed by independent action under 42 USC 2000 (e) et seq or under 42 USC 1983 or both."

It was the above petition that the court of appeals sua sponte dismissed on or about January 10, 1978.

We humbly petition the Supreme Court of the United States to reverse the erroneous sua sponte dismissal and to order the court of appeals to affirm or deny the petitioner's rights to proceed in state court by independent action under the aforementioned Federal statute(s).

To further guide the courts of the State of New York in their consideration of the case of Linfield, the petitioner humbly prays to the Supreme Court to declare:

(i) The courts of the state of New York erred in their administration of CPLR 7511 (p. 14 of this petition).

The courts of the State of New York may not interpret the vacation of arbital award provisions of CPLR 7511 in such a way as to countenance an extra-judicial decision-grievance-arbitration system sustaining racial discrimination. If, prima facie, racial discrimination may be a significant factor in an award, then the constitution requires the court to make appropriate inquiry to determine if there is probable cause to believe that racial discrimination was a significant factor in the award. If the court so determines that there is such probable cause, the court is required to vacate the award on the basis of CPLR 7511, for such an award is "withour regard to discretion in the legal sense of the term" and thus "violates the Constitution of the United States." (Yick Wo)

(ii) The courts of the State of New York erred in their administration of CPLR 103 (c) (p. 13 of this petition).

If properly and on time, a state court receives a petition to vacate an arbitration award in a case allegedly involving racial discrimination, then the petition to vacate is brought in its proper form. There is no necessity for petitioner to change its form in accordance with CPLR 103 (c).

The rights of the petitioner to state juridical scrutiny of the decision-grievance -arbitration process and their award may

be neither diminished nor endangered. A fortiori, if, in particular, a change of form might involve the petitioner in statute of limitation difficulties, juridical countenance of change of form is not permissible and is unconstitutional, for it amounts to an administration of state law by the juridical authorities with a mind so oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioner, a citizen, by the bread and benign provisions of the Constitution of the United States.

The petitioner humbly asks the Supreme Court of the United States to send the case of Linfield back to the courts of the State of New York with the proper constitutional instructions.

(d) (i) New York State Constitution, Article VI, Par. 3 (b) (2) found in McKinney's Consolidated Laws of New York, Book 2, Pages 249-250:

b. Appeals to the court of appeals may be taken in the classes hereafter enumerated in this section;
... In civil cases and proceedings as follows:

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(ii) Civil Practice Laws and Rules (abbreviated CPLR), published by West Publishing Co., copyright in 1972, Book 7B.

CPLR 103 (Page 13):

Form of civil judicial proceedings

(c) Improper form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

CPLR 5601 (Page 496):

Appeals to the court of appeals as of right

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is a statutory provision of the state or of the United States under the constitution of the state or of the United States.

CPLR 7511 (Page 600):

Vacating or modifying award
(b) Grounds for vacating:
1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by
(i) corruption, fraud or misconduct in procuring the award; or
(ii) partiality of an arbitrator appointed as a neutral, except when the award was by confession; or
(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

(iii) Fourteenth Amendment to the Constitution of the United States:

SECTION 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(e) If the dismissal of the court of appeals stands, the petitioner will have reduced or non-existent rights to oppose racial discrimination against him in CUNY's decision-grievance-arbitration process. Indeed, the dismissal determines the case within the meaning of the constitution. This dismissal is an abridgement of a privilege and immunity of a citizen of the United States by the state judicial authorities, and is thus proscribed by the fourteenth amendment. It is an administration of justice so oppressive as to amount to a practical denial of that equal protection of the laws forbidding racial discrimination that Linfield is entitled to.

These fourteenth amendment violations by the court of appeals were preceded by proposed administration by a state supreme court of CPLR 103 (c) and CPLR 7511 (b) interdicted by the fourteenth amendment.

(f) Linfield, in his letter to the court of appeals dated December 14, 1977, stated, "The Court of Appeals has jurisdiction to hear the appeal for the following reason: a refusal to hear the appeal will diminish or endanger the constitutional rights of the petitioner in a racial discrimination case. Such a refusal is not constitutionally permissible under the fourteenth amendment (Yick Wo vs Hopkins)."

Linfield further stated in that letter, "It follows that it is legally unnecessary for the petitioner to amend his peti-

tion pursuantto the provisions of CPLR 103 (c). It is a constitutional requirement that the vacation provisions of CPLR 7511 be interpreted and enforced so that there is perfect harmony between them and our national policy against racial discrimination. ... The reason the law requires the courts of our state to overturn and vacate the award of Arbitrator Stutz is found in Yick Wo v. Hopkins. The award should be declared void by reason of the administration of the decision-grievance-arbitration process in CUNY's remedial program."

On the seventh day of March, 1977, the petitioner wrote to the state supreme court, "This court cannot permit our national policy against racial discrimination to be violated in the union grievance-arbitration process against me..." and the petitioner informed the court of appeals of the above.

Indeed, the petitioner gave to the court of appeals the following material not attached to this petition: (i) respondent's memorandum of law dated March 2, 1977 and containing four pages; (ii) respondent's verification dated March 2, 1977 and containing one page; (iii) petitioner's transcripts and exhibits affidavit dated March 7, 1977 and containing two pages; (iv) petitioner's answer and motions to respondent's counterclaim dated March 7, 1977 and containing three pages; (v) petitioner's notice of motion to vacate arbitration award and affidavit in support thereof dated February 22, 1977 and containing twenty two pages.

The petitioner communicated with New York State's Commission on Judicial Conduct.

The issue before the court is the administration of justice in New York State in such a way as to violate Linfield's fourteenth amendment rights. Clearly this issue could not have been raised before Linfield entered state supreme court.

(g) Not applicable.

(h) The court's power of supervision of the courts of the State of New York should be exercised because Linfield's fourteenth amendment rights have been violated by the state judiciary and contrary to the court's decision in Yick Wo. This violation, almost de jure, judicially sanctions an extra-judicial decision-grievance-arbitration process practicing racial discrimination against white workers in CUNY's remedial program.

(i) The following are the opinions of the courts or administrative agencies in the case:

1. The Court of Appeals of the State of New York

Motion Number 1233 SSD 106

Entered on (or about) January 10, 1978

PRESENT, Hon. Charles D. Breitel, Chief Judge, presiding

In the Matter of David L. Linfield, Appellant, vs. The Board of Higher Educa-

tion of the City of New York, Respondent

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte. A direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved (N.Y. Const., art VI, § 3(b)(2)).

2. Letter from Court of Appeals of the State of New York to David L. Linfield

Signed by Joseph W. Bellcosa, Clerk of the Court

Dated: December 12, 1977

Re: David L. Linfield v. Board of Higher Education of the City of New York

Dear Mr. Linfield:

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte with respect to whether a direct appeal to the Court of Appeals is available pursuant to CPLR 5601 (b)(2). That provision requires appeal from a final judgment (see also CPLR 5515 requiring entry of judgment) where the only question involved on the appeal is the validity of a statutory provision of the

State or of the United States under the Constitution of the State or of the United States. On this appeal where petitioner seeks, inter alia, amendment of " ... the order and judgment ... to affirm or deny the petitioner's rights to proceed by independent action ...;" "... to have ... the arbitrator's award vacated", it appears that appeal pursuant to CPLR 5601 (b)(2) is unavailable and appeal, if available, is properly to an intermediate appellate court.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Very truly yours,

Joseph W. Bellacosa

cc: Mary P. Bass, Esq.

3. Letter from the Commission on Judicial Conduct of the State of New York to David Linfield

Signed by William H. Wallace, III, Staff Attorney

Dated: September 12, 1977

Dear Mr. Linfield:

This is to acknowledge receipt of your telegram dated August 31, 1977, by the State Commission on Judicial Conduct.

Your letter contains insufficient information for us to determine whether we can assist you. Please be advised that the Commission has jurisdiction over complaints of misconduct against judges within the unified state court system. The Commission is not a court of law, however, and cannot act in that capacity. It has no jurisdiction to determine whether a decision or ruling by a judge is correct.

If you would like to make a complaint against a judge, kindly outline your complaint in a letter to the Commission. Your complaint should be as specific as possible regarding the allegations of judicial misconduct.

Very truly yours,

William H. Wallace, III
Staff Attorney

4. Letter from the Commission of Judicial Conduct of the State of New York to David L. Linfield

Signed by William H. Wallace, III, Staff Attorney

Dated: November 28, 1977

Dear Mr. Linfield:

The State Commission on Judicial Conduct has reviewed your letter of complaint dated October 12, 1977 and the transcript of your action in Supreme Court. The Commission is also in receipt of your letter and attachments dated November 17, 1977. The Commission has asked me to advise you that it has no jurisdiction over the matter. Please forward your complaint to John Ray, Esq., Office of Court Administration, 270 Broadway, New York, NY 10007, for appropriate action. Under separate cover, we are returning your transcript.

We regret not being able to assist you.

Very truly yours,

William H. Wallace III
Staff Attorney

5. Order and Judgment of the Supreme Court of the State of New York, First Judicial Department

Index Number 03635/77

Signed by Hon. Martin B. Stecher, Justice, and dated November 15, 1977

In the Matter of the Application of David L. Linfield, Petitioner, against the Board of Higher Education of the City Of New York

The petitioner herein having commenced this proceeding pursuant to Section 7511 of the CPLR for an order or judgment vacating an arbitrator's award and for other appropriate relief and the petitioner having requested a declaratory judgment declaring the respondent's affirmative action policy to be invalid and the respondent having crossmoved to confirm the award and moved to stay the arbitration demanded Dec. 4, 1975 by petitioner, and the application having come on to be heard before me on the seventh day of March, 1977,

NOW, upon reading and filing the Notice of Motion to Vacate Arbitration Award dated February 22, 1977, the affidavit by David L. Linfield in support thereof dated February 22, 1977, Answer and Motion to Respondent's Counterclaim affidavit by David L. Linfield insupport thereof dated March 7, 1977, Transcripts and Exhibits delivered to the Court by David L. Linfield on March 7, 1977 and Verification thereof by David L. Linfield dated March 7, 1977, Respondent's Answer and Counterclaim to Confirm and Stay in opposition thereto for Bernard W. Richland by Mary P. Bass, Esq., dated March 2, 1977, and Respondent's Verification by Mary P. Bass, Esq., dated March 2, 1977, and David L. Linfield,

Counsel Pro Se, having appeared for Petitioner in support of the application and Mary P. Bass, Esq., having appeared by J. Oliver Gluyas, Esq., of Counsel, in opposition thereto; and due deliberation having been had and upon the decision of the Court dated June 30, 1977 having been rendered, it is

ORDERED and Adjudged that the motion to vacate the award made 12/18/76 by R. L. Stutz, arbitrator, is denied, and Respondent's cross petition to confirm the award is granted to the extent that such judgment shall not effect rights which petitioner may have under 42 USC 2000 (e) et seq and 42 USC 1983

ORDERED that the petitioner's motion for a declaratory judgment declaring that the Respondent's "affirmative action program" is unconstitutional and for an order reinstating the petitioner to his former position with back salary and with "de facto tenure" is denied with leave, within sixty (60) days after the entry of this judgment and order, to move in this court to amend the petition pursuant to the provisions of CPLR 103(c) to plead a cause of action under 42 USC 2000e et seq. or under 42 USC 1983 or both, if the petitioner be so advised. Nothing herein contained shall be deemed a determination on the merits concerning the petitioner's right to proceed by independent action under either of the said Federal statutes, and it is further

ORDERED that the petitioner's motion for production of certain records be denied,

and it is further

ORDERED that the respondent's "counter-claim" to stay arbitration is dismissed.

ENTER:

JMB (signed)

Justice of the Supreme Court

6. Decision of the Supreme Court of the State of New York, First Judicial Department, Special Term, Part I

Index Number 03635/77

Signed by Hon. Martin B. Stecher, Justice, and dated June 30, 1977

David L. Linfield, Petitioner, against the Board of Higher Education of the City of New York

STECHER, J.:

This is an application to vacate the award of an arbitrator; for a judgment declaring unconstitutional the respondent's program of "affirmative action" by means of "improved employment opportunities for groups which have been disadvantaged in the past;"and for reinstatement to his position, with back salary and "de facto tenure." The respondent cross petitions to confirm the award and interposes a "Counterclaim to Stay Arbitration" on the theory that petitioner is seeking to rearbitrate a grievance on which an arbitration has already been had.

Petitioner, a non-tenured faculty member of Brooklyn College, engaged in 1970 to teach remedial mathematics to entering students deficient in that discipline, brought a grievance on behalf of himself and filed two demands for arbitration specifying the nature of the dispute as non-reappointment to a teaching position. He requested appointment as a lecturer at Brooklyn College effective September 1, 1975. The agreement to arbitrate is contained in a collective bargaining agreement. The demand for arbitration dated December 4, 1975 cited the arbitration provision and Article 8 of the collective bargaining agreement which provides that neither the union nor the respondent shall discriminate against any employee on various grounds including race. Petitioner claims discrimination against non-Hispanic Caucasians based upon an alleged policy to favor Blacks and Hispanics.

CPLR 7511(b)(1) provides authority for a court to vacate an award where the movant participated in the arbitration, but only upon a limited number of prescribed grounds. The assertion that the arbitrator so imperfectly executed his power that a final and definite award on the subject matter was not made is patently without merit. Petitioner's grievance was clearly dismissed. In a conclusory fashion, petitioner claims that the arbitrator followed legally impermissible procedures. No instance of the arbitrator's failure to follow the procedure prescribed by Article 75 of the CPLR is specified (CPLR 7511(b)(1)(iv)). Petitioner misconceives the role of the arbitrator when he complains that

the arbitrator did not inquire into certain facts. The arbitrator does not make an independent investigation into the facts but makes an award based upon the proof presented by the parties.

The petitioner alleges that the arbitrator "covered up the offense of affirmative action against" him. However, no specific act of misconduct by the arbitrator is set forth in the moving affidavit-petition. Petitioner's basic claim in the moving affidavit-petition is that the arbitrator made an erroneous determination and award. The court does not review an arbitrator's award for errors of law or fact (Matter of Wilkens, 169 NY 494; Matter of Colletti (Mesh) 23 AD 2d, 245, aff'd 17 NY 2d, 460).

The petitioner, however, appears to state a cause of action pursuant to the provisions of the Equal Employment Opportunity Act (Pub.L. 88-352, Title 7, sect.701, et seq., 42 USC 2000 (e) et seq.) and, perhaps, under the Civil Rights Act (42 USC 1983). It is his contention that he was denied reappointment to his position by reason of his race or (which is really a distinction with a difference), because he was not a member of a favored race. While the petitioner, who is proceeding pro se, has drawn papers which are less than artful, they must be read "with the required generosity" (Runnels v Rosendale 449 F 2d, 733,736; see also Hames v. Kenner, 404 US 519) so that we may glean therefrom the essential allegations rather than be limited by the form in which they appear to be couched. His papers adequate-

ly allege a violation of the Equal Employment Opportunity Act.

The word "employers" as used in the statute (42 USC 2000(e), subd. (b)) includes municipalities (Monell v Department of Social Services, etc. 532 F 2d, 259) and local school boards (Harrington v Vandalia-Butler Board of Education, 418 F.S. 603) and quite clearly encompasses the Board of Higher Education of the City of New York. The issue which petitioner submitted to arbitration, the failure of the respondent to retain him in a tenured status, overlaps all of the issues he raises in this proceeding and in other circumstances would be res judicata. Nonetheless, he has not "elected a remedy" by arbitration which will exclude his right to judicial intervention. It has been made clear by our own Court of Appeals that in certain matters of public policy the Courts will not yield their jurisdiction to arbitrators (Aimcee Wholesale Corp. v Lomar Inc., 21 NY 2d, 621) and the right to judicial intervention for violation of the Equal Employment Opportunity Act (42 USC 2000 (e), et seq.) has been held to be precisely such a matter of public policy (Alexander v Gardner-Denver Co., 415 US 36). It is clear from these cases that irrespective of the holding of the arbitrator and any judgment entered herein which may confirm his award, such judgment will in no way have the effect of limiting petitioner's right to proceed under the Equal Employment Opportunity Act (42 USC 2000 (e)) and perhaps under 42 USC 1983.

The disposition of the motions addressed

to the arbitration proceeding alone is simple enough: a judgment may be entered confirming the arbitrator's award to the extent that such judgment shall not affect the rights granted under these statutes (42 USC 1983; 42 USC 2000(e) et seq). At the petitioner's option an order may be made dismissing the petition, reserving the right to the petitioner to proceed anew, in the Federal courts or elsewhere, under these federal statutes. On the other hand, dismissal of the petition is not a necessary consequence of confirming the award. Under our statute (CPLR 103 (c)) if relief is sought in an inappropriate form of action, and relief would be available under a different form of action, dismissal is not mandated "but the Court shall make whatever order is required for (the action's) proper prosecution." It thus appears that if this Court has jurisdiction over actions mandated by the Equal Employment Opportunity Act (42 USC 2000(e), et seq.) an order may be made converting the proceeding to set aside the award in arbitration into a proceeding under that statute.

It is not, however, clear (and the parties have not argued the matter) whether it was the intention of Congress to grant to the state courts of general jurisdiction the power of enforcement under that statute. Thus, on the one hand, in Alexander v Gardner-Denver Co., supra, the U. S. Supreme Court on many occasions makes reference to the fact "that federal courts have been assigned plenary powers to secure compliance with Title VII" (at page 45). On the other hand, it has been held,

by at least one court, that state courts of general jurisdiction have concurrent jurisdiction to enforce the statute, at least where the action is initiated by the allegedly aggrieved party. (Bennun v Board of Governors of Rutgers, etc. 413 FS 1274). It would be premature to determine such an issue now.

It is for the petitioner to elect whether he wishes to terminate this proceeding and commence a new proceeding in the U.S. District Court which clearly has jurisdiction; or proceed before an administrative body in the first instance as is provided for in the statute; or elect to proceed in this action under amended pleadings on the assumption that state courts of general jurisdiction have jurisdiction of the subject matter of his complaint. Among the considerations which may be involved, are statutes of limitation. These choices will be resolved at least in part by the petitioner in the judgment to be settled. The matters are of great complexity and petitioner is advised to consult with counsel before initiating a new proceeding or electing to continue this proceeding.

The request for a judgment declaring the respondent's affirmative action policy to be invalid (cf Boryszewski v Brydges, 37 NY 2d 361; People v Lang, 36 NY 2d, 366) is declined (CPLR 3001). The petitioner has an adequate remedy in the form of a direct action to obtain his statutory rights if 42 USC 2000(e) et seq is applicable to him, and it is unnecessary to have two actions pending involving the same facts and issues. Finally, there is

no need to direct production of records at this stage of the proceeding since the dispute is not presently before the court.

Accordingly, the petition is dismissed to the extent it seeks to set aside the award of the arbitrator without prejudice to seeking relief by court or administrative action pursuant to applicable laws prohibiting discrimination on the basis of race; and the cross-petition to confirm is granted with the same limitation. The counterclaim for a "stay" is dismissed.

Settle judgment.

MBS (signed)

Dated: June 30, 1977

7. Letter from Justice Martin B. Stecher to Hon. Seymour Bieber

Dated: March 8, 1977

Re: Linfield v Board of Higher Education / of New York

This is a matter which may be of considerable sensitivity in that it is an attack on what purports to be the Affirmative Action procedures of the Board of Higher Education of the City of New York. I would hope that you would assign it to a Law Assistant of some experience and ability. It comes to us in the guise of motions and cross motions directed to an award in arbitration and there will be considerable temptation to merely dispose of it as a matter within the arbitrator's discretion.

This is a pro se pleading and should be read "with the required generosity." (Runnels v Rosendale 449 Fed 2d 733, 736; Hames v Kenner 404 US 519). This may be the necessary result but I do hope that careful consideration will be given to the Board of Education claimed underlying right to dismiss the instructor on the eve of tenure, whose dismissal is caused neither by unsatisfactory performance nor financial urgency, but solely by arbitrary determination. This is not a case in which a civil servant servant is discharged during a probationary period.

Despite the language of the foregoing, I have not prejudged this matter but it is merely that I wish to emphasize that additional care must be given to it.

On oral argument Mr. Linfield, the petitioner, said that he demanded production by the City of three items referred to in the petition:

a. Report of the City University Task Force on certain issues here as reported in the Daily News of December 16, 1975.

b. A tape which, in July of 1975, was reported to have been sent by the College to the Board of Higher Education containing details of the College's Affirmative Action program.

c. Petitioner's administrative file.

If these have not been forwarded, consideration should be given as to whether or

not we should order their production.

M.B.S. (signed)

8. Award of Arbitrator Robert L. Stutz and his Statement of the Case both dated December 18, 1976

Case Number 1339-0400-75

In the Matter of the Arbitration between David L. Linfield, individual grievant -and- Board of Higher Education of the City of New York/Brooklyn College

AWARD OF ARBITRATOR

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated October 1, 1973 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The individual grievance filed by David L. Linfield is dismissed.

Robert L. Stutz (signed)

Statement of the Case

Hearings on this matter were held on May 3, 1976 and September 29, 1976 at the offices of the American Arbitration Association, New York, New York. The grievant, David L. Linfield, appeared for himself. The Board of Higher Education was represented at the May 3, 1976 hearing by L. J. Goodwin, Esq., Associate Counsel,

and at the September 29, 1976 hearing by J. Oliver Gluyas, Esq., Associate Counsel. A transcript of the hearings was provided for the arbitrator. The grievant submitted a brief under date of November 18, 1976.

The grievant, David Linfield, was one of a group of 12 instructors in the Department of Mathematics at Brooklyn College on whose behalf the Professional Staff Congress filed a class grievance on December 14, 1973 protesting, among other things, what was termed "notice of premature non-reappointment." This notice was included in letters of reappointment for the 1974-75 academic year. The class grievance also alleged violations of Articles 18 and 20 of the PSC Agreement.

While the class grievance was pending, on September 25, 1974, Mr. Linfield was notified by the Chairman of the Department of Mathematics that the Department Committee on Appointments had not approved his reappointment and that, therefore, his appointment at the College would terminate on August 31, 1975.

The Step Two meeting on the class grievance was held on December 7, 1974 and the decision denying the grievance was issued by the Chancellor's designee on February 10, 1975.

Mr. Linfield filed a "personal grievance" on January 5, 1975 alleging that "the actions of the college authorities in not reappointment me as a Lecturer with Certificate of Continuous employment was

arbitrary," and seeking as a remedy reappointment effective September 1, 1975. It is this grievance that is the subject of this arbitration. Mr. Linfield is claiming that the Board, in connection with his non-reappointment, has violated: (1) Article 8, Non-Discrimination; (2) Article 12.5, Certificate of Continuous Employment; and (3) his contractual rights as a citizen by changing him from a Lecturer to an Instructor shortly after his original appointment at Brooklyn College effective September 1, 1970.

The Board urges the arbitrator to dismiss Mr. Linfield's grievance on the ground of res judicata, claiming that this is the same grievance as the class grievance which was denied and was not appealed to arbitration. On the merits, the Board suggests that Mr. Linfield has utterly failed to establish any case in support of his charge of discrimination, and for that reason, too, the grievance should be dismissed.

Opinion

In view of the tangled and tortuous history of Mr. Linfield's differences with the College and the Board of Higher Education over his non-reappointment for the 1975-1976 academic year, the arbitrator has decided to rule on the merits of Mr. Linfield's claim and to deny the Board's request that it should be dismissed as having been previously decided. Mr. Linfield argued passionately that he is entitled to a hearing on the substance of his claim that he has been the victim of

racial discrimination by a "racial faction" at Brooklyn College which he describes as "a white political elite united with Blacks and Hispanics to rule Brooklyn College's remedial program." The gravamen of Mr. Linfield's charge is that he (a native-born caucasian) was denied reappointment while a non-native born black, who has taught the same subjects that he did, was reappointed in 1973 with a Certificate of Continuous Employment. Mr. Linfield cites numerous statistical data about the make-up of the faculty in the Department of Educational Services at Brooklyn College in support of his charges that the College acted illegally and in violation of the non-discrimination clause in the Agreement by pursuing a policy of affirmative action in the employment of minority persons.

After reviewing the extensive record in this matter, consisting of the transcript of two full hearing days, over 70 exhibits and Mr. Linfield's 270-page brief, the conclusion here has to be that the record does not support Mr. Linfield's charge of discrimination in violation of Article 8. Nor is there any support to his claim that the Board has violated Article 12.5, the Certificate of Continuous Employment provision. His charge that his contractual rights as a citizen were violated back in the Fall of 1970, in addition to being without merit, came much too late to come within the aegis of the grievance being considered here.

Much of Mr. Linfield's argument goes to his criticism of the quality of the ad-

ministration of the remedial program at Brooklyn College and his rights and privileges of citizenship, both areas beyond the arbitrator's jurisdiction.

In support of his claim that he was discriminated against, Mr. Linfield states: "It is illegal and against the contract to act on the belief that minority lecturers or instructors are more likely to meet the needs of minority students in Brooklyn College's remedial program than white lecturers or instructors." However, Mr. Linfield failed to prove by any credible evidence that the College had, in fact, acted on such a belief when it awarded a Kenya-born, black lecturer, who had been at Brooklyn College two years longer than he, a Certificate of Continuous Employment in 1973. Nor did the statistical data offered in evidence by Mr. Linfield establish any such claim.

Mr. Linfield seems to be saying that he was entitled to reappointment for the 1975-1976 academic year and for a Certificate of Continous Employment under Article 12.5 because he had received no unsatisfactory evaluations, but it has been well established that there is no presumption of reappointment under Board policy and thus under the Agreement which governs this dispute. The Board concedes that Mr. Linfield was a satisfactory teacher and so his teaching performance is not at issue. There is nothing in the record to suggest that the decision not to reappoint Mr. Linfield was not in accord with the regular procedures in effect at the College, nor that it was based

on other than academic judgement.

Since the non-reappointment of Mr. Linfield did not violate any term of the Agreement, was in accord with the written policies and bylaws of the Board, and did not constitute an arbitrary or discriminatory application of the bylaws or written policies of the Board, his grievance must be dismissed.

Robert L. Stutz (signed)

(j) The following is the ORDER of the Court of Appeals of the State of New York that we seek reversed.

Motion Number 1233 SSD 106

Entered on (or about) January 10, 1978

PRESENT, Hon. Charles D. Breitel, Chief Judge, presiding

In the Matter of David L. Linfield, Appellant, vs. The Board of Higher Education of the City of New York, Respondent

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the court sua sponte. A direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved. (N.Y. Const., art VI, § 3(b)(2)).

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